

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )

Closed Captioning and Video )

Description of Video Programming )

MM Docket No. 95-176

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COMMENTS OF HOME BOX OFFICE

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Time Warner Entertainment  
Company, L.P.

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**COMMENTS OF HOME BOX OFFICE**

Home Box Office ("HBO"), a division of Time Warner Entertainment Company, L.P. ("TWE"), by its attorneys, hereby submits its comments in response to the Notice of Inquiry ("NOI"), released in the above-captioned proceeding on December 4, 1995.<sup>1</sup> The NOI seeks comments and information on a wide range of issues related to closed captioning and video description of video programming.

In addition, on February 27, 1996, the Commission released an Order,<sup>2</sup> clarifying that the NOI would address closed captioning and video description issues raised by Section 305 of the Telecommunications Act of 1996.<sup>3</sup> In view

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<sup>1</sup> FCC 95-484, released December 4, 1995.

<sup>2</sup> FCC 96-71, released February 27, 1996 ("February Order").

<sup>3</sup> Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56 (1996) ("Act").

of this development, the Commission extended the comment due date in the NOI to March 15, 1996, "to provide parties with an opportunity to refine their comments and to focus on the specific information needed to implement the video programming accessibility provisions with respect to closed captioning and video description." February Order at ¶ 7.

**I. INTEREST OF HBO**

HBO is a leading supplier of pay television programming in the United States. HBO distributes multiple feeds ("multiplex") of two premium programming services, HBO and Cinemax.<sup>4</sup> The HBO and Cinemax services currently are distributed to approximately 29.7 million subscribers.

In addition to the HBO and Cinemax services, HBO (1) owns a 50 percent interest in Comedy Central, a basic cable programming service, (2) owns (with TWE) more than a 50 percent interest in, and manages, E! Entertainment Television, Inc., also a basic service, and (3) operates TVKO, a distributor of pay-per-view boxing events. The HBO services are distributed by means of a wide range of distribution technologies, including cable television systems, SMATV systems, wireless cable systems, telephone

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<sup>4</sup> The multiplex feeds of the HBO service are HBO east, HBO west, HBO 2 east, HBO 2 west and HBO 3. For Cinemax, the multiplex feeds are Cinemax east, Cinemax west, and Cinemax 2 east. In the near future, HBO will add four additional multiplex feeds: HBO 4, Cinemax 2 west, Cinemax 3 and Cinemax 4.

company facilities, C-band satellites ("TVRO"), medium power Ku-band satellites and high power direct broadcast satellites.

## **II. SUMMARY**

As will be discussed in detail below, HBO devotes significant resources to closed captioning of its HBO and Cinemax programming services. The vast majority of programming offered to HBO and Cinemax subscribers is closed captioned. It is primarily the older, previously released movie titles in the library of HBO's Cinemax service that are not closed captioned. These titles generally are shown in non-prime time hours, when viewership is very low. It would be unreasonably burdensome for HBO to caption all of the previously published material in its library, especially in a short period of time, because the potential audience for much of that material is small.

HBO submits that the demands of consumers and competition in the marketplace have adequately ensured that closed captioning is available on premium programming services. Much of the programming provided on premium channel services can be obtained from a variety of sources, including home video, pay-per-view, and competing premium channels. Because of this competition, and because premium services are sold on individual monthly subscriptions and are optional purchases by consumers, it is necessary for premium programming providers to offer the enhancements mandated by the natural

forces of the marketplace. HBO sees no justification, therefore, for imposing any closed captioning regulations on premium programming services (both pay-per-channel and pay-per-view) that already have demonstrated a high level of commitment to hearing impaired viewers. Moreover, any mandatory captioning rules should exempt previously published programming, live programming and interstitial material.

Video description is a relatively new development. There is little information regarding the marketplace demand for video description, or the cost of providing it, either with respect to newly produced programming or previously published programming. HBO believes that if there is sufficient demand for video description that can be fulfilled on an economically sound basis, program producers and distributors will provide the necessary capability without government regulation, just as they have for other types of enhancements such as stereo audio, closed captioning and multi-language audio. HBO also notes that the current methods for providing video description require video description information to be transmitted on the Second Audio Program ("SAP") channel associated with most video services. In HBO's case, the use of the SAP for video description would require HBO to suspend its use of the SAP for transmission of HBO en Español and Cinemax Selecciones, which provide Spanish language tracks of the HBO and Cinemax programming. HBO en Español and Cinemax Selecciones currently are enjoyed by

several million HBO and Cinemax households in the United States.

### **III. AVAILABILITY OF CLOSED CAPTIONING AND VIDEO DESCRIPTION**

#### **A. Closed Captioning**

##### **1. Amount of Programming That Is Captioned**

Referencing the legislative history of the Cable Television Consumer Protection and Competition Act of 1992,<sup>5</sup> the Commission concludes in the NOI that approximately 35 percent of premium cable programming is captioned.<sup>6</sup> These statistics are greatly understated, at least with respect to the amount of closed captioning available today on HBO's two premium service networks. In 1995, almost 80% of the full programming schedule on the HBO network was captioned, and 95% of the prime time schedule was captioned. For Cinemax, approximately 52% of the full schedule, and 69% of the prime time schedule, respectively, were captioned.

Beginning in 1988 and continuing through the present, HBO has allocated a sizable budget to the closed captioning effort. Through the end of 1994, HBO relied on third party captioning services. In 1995, HBO established its own

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<sup>5</sup> H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992).

<sup>6</sup> NOI at ¶ 13.

internal closed captioning department with the goal of captioning more HBO programming.<sup>7</sup>

Most of HBO's closed captioning initiatives have been funded by the company. Government funding to closed captioning services (e.g., the National Captioning Institute) traditionally has been applied to only a few of HBO's titles.<sup>8</sup>

The majority of HBO programming that is not captioned consists of previously published titles (i.e., library product) which is carried primarily on the Cinemax service. Because HBO does not have the capability to caption all of its programming, it allocates its resources to captioning the programming that will be watched by the most consumers, including hearing impaired consumers. As a result, the great majority of HBO's non-captioned product is carried in low viewing hours, i.e., non-prime time.

## 2. Captioning on Other Delivery Systems

Pursuant to HBO's affiliation agreements, all of its redistributors (e.g., cable, DBS, wireless cable) are

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<sup>7</sup> The captioning of live programming requires experts with very specialized skills. Accordingly, HBO continues to rely on outside vendors to caption its live presentations.

<sup>8</sup> In 1995, only 8 percent of HBO's total programming hours qualified for government grants for closed captioning.

required to retransmit HBO's closed captioning material. Thus, with respect to the HBO/Cinemax services, all subscribers have the ability to receive the available closed captioning information. The affiliates of other networks also, in all probability, retransmit the closed captioning data supplied by their respective networks. Therefore, unless the record in the NOI establishes that redistributors routinely do not retransmit network-supplied closed captioning data, there does not appear to be any need for regulations to ensure that various redistribution systems transmit the captioning material made available by program networks.

### 3. Captioning by Program Type

The most popular and most recently released theatrical titles carried on the HBO and Cinemax services are closed captioned. In addition, a large percentage of the programming produced by or made for HBO (i.e., HBO original programming such as documentaries, series, etc.) also is captioned. Set forth below are statistics showing, by categories, the percentages of programming carried on the HBO service in 1995 that were captioned:

<u>HBO Category</u>	<u>% Closed Captioned in 1995</u>
Theatrical Motion Pictures	76%
Music	83%
Documentaries	94%
Family Programming	72%
Series	82%
Comedy	100%
Other	100%

#### 4. Previously Published Programming

As noted above, most of the programming carried on the HBO service is captioned. The theatrical releases on HBO generally are of more recent vintage, and accordingly, the product is captioned by the producers. The Cinemax service relies more heavily on older (library) theatrical releases, much of which has not previously been captioned. In 1995, even though 70% of the titles aired on Cinemax were not captioned, these titles were presented primarily during low-viewing day parts. Almost 70% of Cinemax's prime time programming in 1995 was captioned.

In HBO's experience, once enhancements to video programming are developed, they generally are phased in over time in response to consumer demand. For example, in 1990, 61 percent of HBO's schedule was delivered with stereo sound. By 1995, the stereo enhancement was available in 86 percent of HBO's schedule. Similarly, the amount of closed captioning on the HBO service increased from 63 percent of the schedule in 1990 to almost 80 percent of the schedule in 1995. HBO believes that these trends will continue naturally, and that eventually, almost all of the HBO schedule will be captioned.

It would be a tremendous operational and financial burden on television programming companies to require that all previously published programming be captioned, especially

over a period of just a few years. The burden on HBO would be severe and the effect on other services that rely even more heavily on previously published product (e.g., TNT, The Family Channel) would be of even greater significance. As noted previously, HBO prioritizes the use of its closed captioning resources and, using a cost/benefit analysis, devotes those resources to the programs that are likely to attract the largest audiences. In this manner, the programs that are likely to be enjoyed by the largest number of hearing impaired viewers will be captioned first.

Over time, the amount of captioned previously published programming carried on the HBO services will increase further. HBO's ongoing captioning efforts will eliminate some of the backlog, and, as library product is replaced with more recently produced programming, much of that newer product will have been captioned by the program owners or by others.<sup>9</sup>

In view of the voluntary efforts that clearly are providing positive results, it is unnecessary to require completion of the captioning task for previously published titles by a date certain. The Commission should continue to

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<sup>9</sup> In HBO's experience, various segments of the programming industry are cooperating to aggregate their captioning resources for maximum consumer benefit. For example, if HBO captions a previously published theatrical title that it has licensed, it offers the captioning, for a nominal fee, to the program owner, who may then make the captioning available to other licensees.

rely on the good faith efforts of program owners and distributors to achieve maximum availability of closed captioning material to the largest number of consumers who need it.

**B. Video Description**

Video description currently is not available on any of the programming carried on the HBO and Cinemax services. Moreover, based on the existing video description technology, which requires the use of the SAP to transmit the necessary information, HBO and its Spanish speaking subscribers would experience a substantial hardship if HBO were forced to implement video description on its services. Currently, the SAP on the HBO and Cinemax services is devoted to HBO en Español and Cinemax Selecciones, which are available to several million HBO and Cinemax subscribers. Based on today's technology, those services would have to be terminated in order to accommodate video description.

Before the Commission proceeds to recommend or to promulgate any regulations regarding video description, it should quantify the market demand for the service and determine the economic and operational impact that video description would have on existing program producers, networks and distributors. The Commission also should consider what classes of video programming would not be materially enhanced by video description. Genres such as "talking head" interview programs, stand up comedy, and

sports play-by-play are unlikely to be enhanced for visually impaired individuals by the addition of video description. In addition, the action and dialog of some programs may not lend themselves to effective video description.<sup>10</sup>

HBO generally has been successful in sensing demands for enhancements to video programming and responding in a timely fashion with attractive and cost-effective solutions. To date, HBO has not perceived a demand for video description sufficient to warrant the infrastructure and commitment of resources necessary to implement it or to justify displacing HBO's Spanish language services. In HBO's experience, enhancements to premium programming services, such as second language sound tracks, stereo audio and closed captioning, tend to evolve as the marketplace demands them. HBO believes that a similar marketplace approach, rather than government regulations, should be followed with respect to video description.

#### **IV. MANDATORY CAPTIONING AND VIDEO DESCRIPTION REQUIREMENTS**

As a general matter, HBO believes that marketplace forces have proved to be a significant motivator to the provision of closed captioning. A substantial amount of

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<sup>10</sup> Copyright issues also must be considered, such as who possesses the rights to add video description material to a title and who "owns" the video description material once it is incorporated into a program.

programming produced today is captioned at the outset by program producers, and the captioned information is transmitted by a wide range of distribution outlets. There is no need, therefore, in HBO's opinion, for any regulatory intervention to mandate captioning obligations.

To the extent the Commission believes it is compelled by Section 305 of the Act to impose mandatory captioning requirements, HBO would urge that these requirements be imposed on the producers or "owners" of the programming who are in the best position to insert the closed captioning information into the product when it is produced and before it is made available through multiple distribution outlets. Placing the mandatory captioning burden on networks or local distributors would require multiple, inefficient captioning efforts and place a duplicative and unnecessary burden on multiple segments of the country's television distribution system.

With respect to video description, the Commission is required by Section 305 to report to Congress on its findings on various legal, technical and operational issues. There is no indication that mandatory video description requirements are to be imposed, and, as noted above, much information needs to be developed, and the marketplace needs to be given a chance to work, before government intervention should be contemplated.

## **V. EXEMPTIONS**

To the extent Section 305 of the Act may require the Commission to adopt regulations mandating closed captioning, the Commission is authorized to "exempt by regulation programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming." 47 U.S.C. § 713(d)(1). Moreover, programming providers or owners may petition the Commission for an exemption based on a showing that mandatory captioning would result in an "undue burden" on the provider or owner. 47 U.S.C. § 713(d)(3). In assessing "undue burden," the Commission is to consider "(1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner." 47 U.S.C. § 713(e).

Under the standards articulated in Section 713(d)(1), HBO submits that previously published programming, live events and interstitial material should be classes of programming exempt from mandatory closed captioning. As noted above, the programming that appears in high viewing day parts (e.g., prime time) is already substantially captioned. But, there is a high volume of previously published titles in the libraries of HBO and other programmers that is aired

during very low viewing periods and that is not captioned. The decision not to caption this material is based on cost/benefit analyses of how limited captioning resources should be deployed. Clearly, it is in the best interest of the majority of hearing impaired viewers that closed captioning efforts be devoted first to the most popular programming and day parts. Moreover, over time, the inventory of non-captioned material will decrease as more captioning is done and older non-captioned product is replaced with newer titles that are captioned. Thus, granting an exemption for previously published titles would relieve programmers of a heavy cost and operational burden, and the exemption would not undermine the goal of having a greater percentage of titles ultimately captioned.

Although much of HBO's live material is captioned, HBO submits that an exemption of live presentations from any mandatory captioning requirements also is appropriate. Live programming is difficult and expensive to caption. Moreover, HBO does not believe there are sufficient numbers of qualified closed captioning providers available today to respond to a broad requirement that live programming be captioned. Again, HBO believes that the marketplace will respond to live program captioning, but it needs to be phased in as the marketplace develops, not by regulatory mandate.

Interstitial material is another category that should be exempt from mandatory closed captioning. The interstitial

material on the HBO and Cinemax networks consists of promotional and other material that is programmed between the feature presentations. This material does not attract a high level of viewership. Given a choice of allocating captioning resources between the feature programming and interstitial material, the cost/benefit analysis clearly favors the feature programming. Moreover, because of its promotional nature, much of interstitial programming contains on-screen graphics that provide the same information that is contained in the program audio. Thus, in many instances, hearing impaired individuals have access to the audio information in the interstitial material, even though it is not captioned.

Finally, HBO submits that premium services (both pay-per-channel and pay-per-view) should be classified as exempt. First, premium services such as HBO already are expending significant resources and efforts to provide closed captioning on a voluntary basis to satisfy the demands of their viewers. Nevertheless, captioning resources have to be devoted first to those programs which are judged most likely to attract the largest audience (including hearing impaired viewers). The Commission should rely on the good faith efforts that have been made and refrain from ordering further, burdensome captioning requirements. Second, premium services compete with each other to attract viewers to watch, in many cases, the same programming titles. Thus, the natural competitiveness of these services will compel them to

offer enhancements, including captioning, to attract as many viewers as possible. Finally, premium services clearly are discretionary entertainment services. Consumers generally make a monthly (or in the case of pay-per-view, a spontaneous) decision to purchase or not to purchase. If premium services do not provide captioning and other enhancements required by consumers, the consumer will not make the purchase.

#### **VI. TECHNICAL AND QUALITY STANDARDS**

At Paragraph 32 of the NOI, the Commission seeks comment on whether it should adopt technical or quality standards to "ensure that video descriptions are accessible and understandable to individuals with vision disabilities." Because video description is a newly-developing enhancement, HBO believes that government standards-setting is premature at best and may prove to be unnecessary. This is especially true given the absence of any assessment of market demand and cost implications. As has happened time and again with other enhancements to programming services, the marketplace will solve whatever issues of quality and technical standards arise much faster and more efficiently than government regulation.

#### **VII. TRANSITION**

If the Commission exempts previously published programming and live programming from any mandatory captioning requirements, HBO believes that a minimum of three

(3) years would be necessary to implement captioning for the remainder of the non-exempt material. During this period, captioning facilities, both external and internal, would need to be developed, and personnel would have to be hired and trained.

If the Commission imposes broad and large scale captioning requirements for previously published and live programs, the transition period will, of necessity, have to be lengthened. Based on HBO's assessment of the amount of live and non-captioned previously published material industry-wide, and the current and likely near-term availability of captioning facilities and qualified personnel, HBO estimates that the following transition would be the minimal necessary to accomplish the captioning of the current amounts, industry-wide, of live programming and previously published libraries:

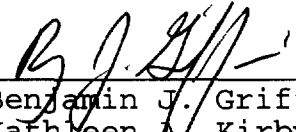
<u>Time</u>	<u>Amount of Live and Previously Published Material To Be Captioned</u>
3 years from adoption of rules	50%
5 years from adoption of rules	75%
7 years from adoption of rules	100%

#### **VIII. CONCLUSION**

HBO has made substantial efforts to caption the programming offered on its HBO and Cinemax services. With respect to premium services, which are discretionary purchases, HBO submits that marketplace forces have and will continue to ensure a high level of captioning without government intervention. Any mandatory captioning requirements also should exempt previously published titles, live programming and interstitial material. There should be no regulation with respect to video description until sufficient and demonstrated demand develops and it is determined that marketplace forces are not responding appropriately to the demand.

Respectfully submitted,

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